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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-319

WALTER J. CUKROWSKI, HELEN G. CUKROWSKI and KATHLEEN CUKROWSKI,

Petitioners,

vs.

MT. SINAI HOSPITAL, INC., DR. RICHARD L. FRANKLIN, DR. IRVIN M. BECKER, DR. WALTER HOGAN, DR. PHILLIP S. GUZELIAN, DR. HERBERT A. OXMAN, and DR. HENRY M. GOLDBERG,

Respondents.

PETITIONERS' REPLY BRIEF

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RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS

The respondents allege that their opposition has set forth facts without record foundation, without specificity but with imputation of the same by juxtaposition to a rehash of portions of petitioners' statement of facts. Petitioners could requote the lower court's opinion on the unpaid $25,000 services performed by petitioners' counsel as facts considered by that court, but such would only be a restatement of the trial and lower appellate court record. Appendix p. 130-151, Record p. 247-264.

REPLY TO RESPONDENTS' ARGUMENT

(Numbered as in Respondents' Brief)

1 - and 2

It appears that Respondents consider the issues merely to be either "scholarly" or "of benefit only to Petitioners", and that inability to pay counsel currently could not affect the case.

Query, if merely scholarly;

Would the American Bar Association be looking for a solution with its Special Committee on Prepaid Legal Services?

Would an entire issue, (V. II No. 2) of Trial, The National Legal Newsmagazine of the Association of Trial Lawyers of America, be devoted to a solution?

Would the Staff Director of said A.B.A. Committee write in said issue of Trial, supra, at page 12:

> "The OEO Legal Services Program (of the "War on Poverty") has been aptly described as the most massive example of a closed panel system of prepaid legal services in existence. The development of systems for the poor is *especially significant since it produced the anomaly of many persons in the poverty class having more availability of legal services than their allegedly more fortunate brothers in the lower reaches of the middle class.*"

and in another article in the same issue of Trial, *supra,* at page 30, (Re: Insured plans):

> Self-insured "plans may simply refuse to pay for services when the fund is financially exhausted. When such an event occurs, the purpose of the fund is obviously frustrated. The helpless consumer is either left without services for which he has paid dues or the service provider, the lawyer, must work without payment of his fees. *Both of these alternatives are disastrous.*"

At least the American Bar Association realizes, even though defendants do not, that the unfunded contingent fee contract is no solution for 128 million middle income Americans with a large case.

Respondents suggest for the first time on responding to this petition that this case could have been tried without any expert witnesses, "as res ipsa loquitur case". This is a false statement of the record; see the Petition for writ, Appendix D, page 3d, Dr. E. Clinton Texter:

> "That it is your affiant's opinion that a layman would not be able to say as a matter of common knowledge that the consequences of the professional treatment of Walter Cukrowski in this action were not those which ordinarily result if due care is exercised;"

Respondents also suggest for the first time that this case could have been tried without an expert "under the doctrine of informed consent". This is a false statement of the record; see the Petition, App. D, *supra,* at 5d:

> "It is affiant's opinion - - - that such advice is customarily given in such instances in Milwaukee, Wisconsin; and further that a layman could not give such an opinion as a matter of common knowledge."

Respondents also suggest for the first time that the case could have been tried without expert witnesses by the use of learned treatises. One prerequisite in the case they cite, *Lewandowski vs. Preferred Risk Mut. Ins. Co.,*

33 Wis. 2d 69; 146 NW 2d 505, is that an expert witness should testify that the source is reliable authority.

The Respondents further imply for the first time that Petitioners kept secret the name of Dr. E. Clinton Texter from the Trial Court. When it is recalled that experts' names were to be exchanged on *May 11, 1973* and use of Dr. Texter was clearly first authorized by *Schier vs. Friedman,* 58 Wis. 2d 269, 206 NW 2d 166, which was published in an advance sheet on *May 10, 1973,* the absurdity of Respondents' argument is clear, particularly in view of the peripateticity of Dr. Texter's residence; see Appendix 6d to Petition.

Petitioner (daughter) timely appealed to Supreme Court of Wisconsin.

The Respondents argue for the first time (Brief in opposition to writ, page 11):

> "There is (sic-was) no need to discuss this matter before the Wisconsin Supreme Court since no timely appeal was taken."

Such argument now can only be characterized as an intentional misstatement of Wisconsin law, or at very least a grossly negligent misstatement of such law. In this petition for a Writ of Certiorari to the Supreme Court of Wisconsin, page 15, there appears the following statement:

> "She timely appealed from the judgment against all your petitioners, Wisc. Stat. 274.01, Sawejka vs. Morgan, 1972, 56 W 2d, 70, 74, 201 NW 2d 528."

Sawejka, supra, holds — Headnote 1:

> "Timely appeal to the supreme court from a judgment entered on an order sustaining demurrer to a complaint conferred jurisdiction on the supreme Court notwithstanding failure to appeal from the order, albeit this itself was appealable, because the judgment brought up for review the order sustaining the demurrer upon which it was based. pp. 73, 74."

If there had been no timely appeal the lower court would have so disposed of her appeal instead of in the unconstitutional method utilized.

No Evidence In Record?

For the first time, and in Reply to this Petition, Respondents contend in direct opposition to their position before the Supreme Court of Wisconsin, that there is no evidence in support of Petitioners' Questions 4 and 5.

Before the trial and lower appellate courts, the existence of the evidence was conceded, and Respondents drew conclusions therefrom; for instance, in their Respondents' Brief before the Supreme Court of Wisconsin (Pages 5-6):

> "The appellants, however, make the emotional claim that the defendants offered various sums of money in settlement and that the plaintiff, Walter Cukrowski, has large medical bills, and that if the case is affirmed on appeal, he will have lost this pot of money that he *otherwise certainly would have received.*", (Italics mine).

The defendants have never previously challenged the existence of their written settlement offers, referred to

at the trial court level. App. 138, Rec. 254; App. 158, Rec. 281-2.

CONCLUSION

It is respectfully submitted, that the Petition for a writ be granted.

Respectfully submitted,

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Attorney for Petitioners